90-11

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PAUL A. ARGUELLO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

RICHARD F. O'HAIR
Colonel, Office of The Judge Advocate General
United States Air Force
HQ USAF/JAJD
Bldg 5683
Bolling AFB, DC 20332-6128
(202) 767-1562
Counsel of Record

RONALD A. GREGORY
Captain, Office of The Judge Advocate General
United States Air Force
Attorneys for Petitioner

JULY 1990

QUESTION PRESENTED

Whether the petitioner was denied procedural due process when the Court of Review reassessed sentence without considering the effect of prejudicial error on the court-martial.*

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* This question and this petition are presented to this Honorable Court pursuant to Article 70(c)(1) of the Uniform Code of Military Justice, 10 U.S.C. § 870(c)(1) (Supp. III, 1985), and *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

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The petitioner, Paul A. Arguello, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on April 2, 1990.

OPINIONS BELOW

The order of the United States Court of Military Appeals granting review and affirming the lower court's sentence reassessment is reported at —— M.J. —— (C.M.A. April 2, 1990). (Appendix A). An unpublished decision of the United States Air Force Court of Military Review was rendered November 17, 1989. (Appendix B).

JURISDICTION

The jurisdiction of this Court is invoked under 10 U.S.C. § 867(h) (Supp. III 1985) and 28 U.S.C. § 1259(3) (Supp. III 1985). The judgment of the Court of Military Appeals was entered on April 2, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty or property, without due process of law . . .

Article 66(c) of the Uniform Code of Military Justice, 10 U.S.C. § 866(c) provides:

> In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. . .

STATEMENT OF THE CASE

The petitioner was tried and convicted by general court-martial of one specification of wrongfully using marijuana, two specifications of distributing marijuana, and making a false statement under oath in violation of Articles 112a and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 934, respectively. He was sentenced to a bad conduct discharge, confinement for two years, and reduction to airman basic (E-1). The convening authority approved the sentence as adjudged on July 19, 1987. The United States Air Force Court of Military Review affirmed the findings and sentence on May 12, 1988.

The Court of Military Appeals reversed as to the specifications of marijuana use and making a false statement under oath. The Court of Military Appeals authorized the lower court to either set aside the sentence and order a rehearing or dismiss the affected specifications and reassess the sentence based on the remaining findings of guilt on two specifications of wrongfully distributing marijuana. *United States v. Arguello*, 29 M.J. 198, 206 (C.M.A. 1989).

The Air Force Court of Military Review chose to dismiss the affected specifications and reassess the sentence. After noting that the maximum punishment was reduced from 35 years to 30 years confinement, the court concluded that the adjudged sentence of two years confinement had not been affected by the error in the dismissed specifications and Charge. The court found, therefore, the sentence originally imposed to be appropriate. *United States v. Arguello*, ACM 26182 (f rev) (A.F.C.M.R. Nov. 17, 1989). The Court of Military Appeals affirmed the lower court's sentence reassessment, citing *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). *United States v. Arguello*, No. 60381 (C.M.A. Apr. 2, 1990) (order granting review and affirming decision below).

REASONS FOR GRANTING THE WRIT

The United States Court of Military Appeals erred in affirming the lower court's flawed reassessment of sentence. In *Jackson v. Taylor*, 353 U.S. 569, 77 S.Ct. 1027, 1 L.Ed.2d 1045 (1957), this Court recognized the authority of a review board (now court of review) to modify an aggregate sentence after some findings of guilt by a court-martial are set aside. Article 66(c), *supra*, clearly empowers courts of military review to evaluate the appropriateness of the sentence adjudged; however, this power is not without limit.

In *United States v. Suzuki*, 20 M.J. 248 (C.M.A. 1985), the Court of Military Appeals emphasized that sentence reassessment following prejudicial error at trial involves two considerations. First, the court of review must assure that the sentence is appropriate for the remaining findings of guilt. Second, the court must assure that the sentence imposed is no greater than that which would have been adjudged absent the error.

In effect, the court of review must put itself in the place of the court members who originally adjudged the sentence. *United States v. Peoples*, 29 M.J. 426 (C.M.A.

1990). This analysis is necessary to comply with the congressional requirement that sentences be imposed by the court-martial. *Suzuki*, 20 M.J. at 249. *See* Articles 51 and 52, U.C.M.J., 10 U.S.C. §§ 851 and 852, respectively. The court of review may act only with respect to the findings and sentence as approved by the convening authority. Article 66(c), *supra*.

In *Sales*, 22 M.J. 305, 307 n.3, the court elaborated upon the second prong of the above analysis by recognizing that in some cases the court of review cannot be reasonably certain what sentence would be imposed absent the error. In this event the lower court should not reassess the sentence but should order a rehearing on sentence. Since the decision in *Jackson*, the Court of Military Appeals has expressly recognized the desirability of rehearing on sentence in appropriate cases. *See, e.g., United States v. Dukes*, 5 M.J. 71 (C.M.A. 1978).

The court of review reassessed the petitioner's sentence only in the context of the maximum punishment for the remaining findings of guilt. Since the maximum punishment authorized would "be substantially the same" the court was "convinced" that the sentence adjudged which included two years confinement was not affected by the error. *Arguello*, ACM 26182 (f rev), slip op. at 2.

The decision by the court of review does not show application of the second prong of the analysis: what effect did the error have on the court members who adjudged the sentence. Simply reciting the maximum punishment is insufficient to comply with this requirement. Absent the error the court members would not have learned that the petitioner used illegal drugs and made a false statement under oath. Surely the two years confinement includes punishment for these offenses as well. If the court could not adequately address this second part of the analysis a rehearing on sentence should have been ordered.

By not putting itself in the position of the court members or, alternatively, ordering a rehearing on sentence, to purge the record of prejudicial error, the court of review circumvented the court-martial sentencing process established by Congress. *Suzuki*, 20 M.J. at 249; *see Peoples*, 29 M.J. at 426, 429.

CONCLUSION

The procedures for sentence reassessment following prejudicial error are necessary to ensure compliance with the congressional mandate that sentences be imposed by the court-martial. The sentence reassessment in this case denied the petitioner the procedural due process established by Congress. The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD F. O'HAIR
Colonel, Office of The Judge
Advocate General
United States Air Force
HQ USAF/JAJD
Bldg 5683
Bolling AFB, DC 20332-6128
(202) 767-1562
Counsel of Record

RONALD A. GREGORY
Captain, Office of The Judge
Advocate General
United States Air Force
Attorneys for Petitioner

JULY 1990

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 60381/AF
CMR Dkt. No. 26182

UNITED STATES,
Appellee

v.

PAUL A. ARGUELLO (524-02-1026),
Appellant

ORDER

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Military Review in light of *United States v. Sales*, 22 MJ 305 (CMA 1986), it is by the Court this 2nd day of April, 1990

ORDERED:

That said petition is hereby granted on the issue raised by appellate defense counsel; and

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel
Appellate Government Counsel (RAMSEY)

APPENDIX B

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

UNITED STATES

v.

Staff Sergeant PAUL A. ARGUELLO, FR 524-02-1026
UNITED STATES AIR FORCE

ACM 26182 (f rev)

17 November 1989

Sentence adjudged 19 March 1987 by GCM convened at Peterson Air Force Base, Colorado. Military Judge: Charles W. Fowler.

Approved sentence: Bad conduct discharge, confinement for two (2) years and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Leo L. Sergi, Colonel Richard F. O'Hair and Captain Laurence M. Soybel. Appellate Counsel for the United States: Colonel Joe R. Lamport; Colonel Robert E. Giovagnoni; Major Terry M. Petrie and Major Mark C. Ramsey, USAFR.

Before

FORAY, LEONARD and MURDOCK
Appellate Military Judges

DECISION UPON FURTHER REVIEW

PER CURIAM:

Appellant was convicted by a general court-martial, with members, of one offense of using marijuana, two of-

fenses of distributing marijuana, and one offense of making a false sworn statement, in violation of Articles 112a and 134, UCMJ. He was sentenced to a bad conduct discharge, confinement for two years, and reduction to the grade of airman basic. On 12 May 1988, this Court, in an unpublished opinion, affirmed the approved findings of guilty and the sentence in the case. *United States v. Arguello*, No. 26182 (A.F.C.M.R. 12 May 1988).

On 28 May 1988, appellant submitted a petition for a grant of review to the Court of Military Appeals. On 4 October 1988, that Court granted appellant's petition for grant of review of our decision. *United States v. Arguello*, 27 M.J. 416 (C.M.A. 1988).

On 28 September 1989, the Court of Military Appeals reversed our decision as to specification 1 of Charge I (using marijuana), Charge II and its specification (making a false sworn statement), and the sentence, and set aside the findings of guilty of those offenses. The Court returned the record of trial to The Judge Advocate General for remand to this Court to either set aside the sentence and order a rehearing on the affected specifications and Charge II or dismiss those specifications and reassess the sentence on the basis of the remaining findings of guilty. *United States v. Arguello*, 29 M.J. 198 (C.M.A. 1989).

We dismiss specification 1 of Charge I and Charge II and its specification and will reassess the sentence based on the remaining findings of guilty.

At the trial of this case the court members were advised by the military judge that the maximum punishment for all of the offenses of which appellant was found guilty was a dishonorable discharge, confinement for 35 years, and reduction to the lowest enlisted grade. As a result of our decision dismissing the affected specifications the maximum punishment imposable for the re-

maining findings of guilty would be substantially the same except for confinement which would now be 30 years. As a result, we are convinced that the sentence adjudged had not been effected by the error committed by the military judge in failing to dismiss the affected specifications at trial. *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). Accordingly, we reassess the sentence and find the sentence as adjudged by the general court-martial against appellant to be, nonetheless, appropriate and is

AFFIRMED.

[SEAL]

OFFICIAL:

/s/ Mary V. Fillman
MARY V. FILLMAN
Captain, USAF
Chief Commissioner

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